BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
T-Mobile *et al.* Petition for Declaratory Ruling	)	
Regarding Incumbent LEC Wireless	)	
Termination Tariffs	)	

To: The Secretary, Federal Communications Commission

PETITION FOR RECONSIDERATION

AMERICAN ASSOCIATION OF PAGING CARRIERS (AAPC), by its attorney, respectfully petitions the Federal Communications Commission for reconsideration in part, as hereinafter set forth, of its Declaratory Ruling and Report and Order in the captioned proceeding (the "Ruling"), FCC 05-42, adopted February 17, 2005, released February 24, 2005 and published at 70 Fed. Reg. 16141 (30 March 2005). In support of its petition, AAPC respectfully states:

Background

The Ruling was issued in an attempt to deal with disputes engendered by the practice of some two-way wireless carriers of terminating their (mobile-originated) telephone traffic into wireline exchanges without having an interconnection agreement with the wireline exchange operator to govern compensation or other terms and conditions of the traffic exchange. As one way of establishing compensation arrangements, a number of independent ILECs filed so-called "wireless termination" tariffs with state commissions to apply in situations where no interconnection agreement or reciprocal compensation arrangement exists between the originating and terminating carriers. In response to the filing of such tariffs, T-Mobile USA, Inc. and certain other two-way wireless carriers filed a petition for declaratory ruling (the "Petition") seeking an affirmation by the Commission that "wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic." Petition at p. 1. The Petition was incorporated into the previously established proceeding in CC Docket No. 01-92 broadly inquiring into intercarrier compensation arrangements; and comments on the Petition were requested from interested parties.[1]

In its Ruling, the Commission denied the declaratory rulings specifically requested by petitioners and held that the wireless termination tariffs heretofore filed by the ILECs are not unlawful. Ruling at ¶¶9-13. On a prospective basis, however, the Commission amended Section 20.11 of its rules by adding a new subsection (e) prohibiting ILECs from imposing compensation obligations for non-access traffic pursuant to tariff. *Id.* at ¶14. Moreover, finding it "necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today," the Commission went on to amend Section 20.11 "to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act." *Id.* at ¶16. Specifically, in this regard, the Commission added a new subsection (f) to Section 20.11 reading as follows:

> (f) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in §51.715 shall apply.

[1] *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic,* Public Notice, DA 02-2436, released September 30, 2002.

Amended Section 20.11 was published in the Federal Register on March 30, 2005, and accordingly becomes effective on April 29, 2005. Petitions for reconsideration of the Ruling thus are likewise due to be filed on or before April 29, 2005. *See* 47 C.F.R. §1.429(d).

Identity and Interest of Petitioner

AAPC is the national trade association representing the interests of paging carriers throughout the United States. AAPC's members comprise a representative cross-section of the CMRS paging industry, and they operate nationwide, regional and local paging systems licensed under Parts 22, 24 and 90 of the Commission's rules. Members of AAPC provide Commercial Mobile Radio Service (CMRS) as defined by the Commission's rules. *See* 47 C.F.R. §20.3 (definitions of "mobile service," "interconnected service" and "commercial mobile radio service"). Accordingly, pursuant to new §20.11(f) adopted by the Ruling, ILECs now ostensibly can request interconnection from paging carriers and, failing a voluntarily negotiated agreement, for the first time ever can require paging carriers to submit to mandatory arbitration at the state commissions under the procedures prescribed in Section 252 of the Act.

Argument for Reconsideration

As a preliminary matter, AAPC emphasizes that it does not take a position on the Commission's ruling on the issues specifically raised in the Petition. Due to the one-way flow of traffic exchanged between wireline carriers and paging systems, paging carriers do not terminate telephone calls into wireline exchanges, and therefore are not subject to or affected by the mobile termination tariffs that spawned the Petition. That fact also is why AAPC had no reason to, and did not, participate in this proceeding heretofore. Accordingly, AAPC takes no position in this proceeding on the Commission's specific ruling that mobile termination tariffs are not unlawful retrospectively, but should be declared unlawful prospectively.

Unfortunately, in AAPC's view, the Commission did not confine itself to a declaratory ruling in response to the Petition, but instead went on to adopt a rule in new Section 20.11(f) that clearly does purport to govern paging carriers in their interconnection relationships with ILECs. It is that portion of the Ruling, *viz.*, new Section 20.11(f), to which AAPC's petition for reconsideration is directed.

AAPC respectfully submits that new Section 20.11(f), which was adopted without providing general notice of "either the terms or substance of the proposed rule"[2] in apparent disregard of the Administrative Procedures Act, is manifestly in conflict with the Communications Act; and is otherwise improvident and unlawful. Accordingly, the Commission should reconsider its Ruling to the extent it promulgated new Section 20.11(f) of the rules; and it should adopt a solution to the identified problem that does not improperly burden paging carriers and otherwise is in harmony with the explicit provisions of the Communications Act.

Section 252(b)(1) of the Communications Act very clearly states that "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which *the incumbent local exchange carrier receives a request for negotiation* under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." 47 U.S.C. §252(b)(1). (Emphasis added). Under Section 252, therefore, the *ILEC's* receipt of a request for interconnection from another telecommunications carrier is an explicit condition precedent to that ILEC's right to petition a State commission for compulsory arbitration. New Section 20.11(f) would rewrite the statute by making the right to request interconnection bilateral, not unilateral, and it is therefore palpably in conflict with the statute.

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[2] *See* 5 U.S.C. §553(b)(3) (in relevant part requiring general notice of a proposed rulemaking to be published in the Federal Register containing "either the terms or substance of the proposed rule").

The reason for the statutory provision is self-evident. Congress recognized the obvious fact that ILECs have substantial market power, which can be and historically has been deployed from time to time to impair the development of a diverse and competitive telecommunications marketplace. By confining the right to request interconnection solely to non-ILEC telecommunications carriers, Congress sought to curb the ability of ILECs to employ costly litigation tactics to limit or destroy nascent competition and technology.

That consideration applies with special force in the case of the paging industry. While the largest carriers in the paging industry may be readily able to afford the cost of compulsory arbitration proceedings at state commissions, the same is not true with respect to the many smaller paging carriers operating local or regional networks throughout the United States. These smaller paging carriers, characteristically, are privately held, family owned and operated businesses. Most of these carriers have interconnection arrangements that antedate the 1996 Telecommunications Act, and the reciprocal compensation newly available to them as a consequence of their Section 251(b)(5) rights is so meager that many, if not most, paging carriers have concluded that the cost of invoking negotiation/arbitration process is simply not worth it.[3] It is their statutory right under the Communications Act to make this choice without having it overruled by the interconnecting ILEC.

Even more to the point, the problem sought to be addressed in the Ruling has nothing to do with the paging industry. As noted above, paging carriers inherently do not terminate telephone calls into wireline exchanges, and, therefore, paging carriers have not engaged in the prac-

[3] In this regard, AAPC is struck by the facile claim in the Regulatory Flexibility Analysis that "our actions in this Order should benefit all interconnected LECs and CMRS providers, *including small entities*, by facilitating the exchange of traffic and providing greater regulatory certainty and *reduced litigation costs*." Ruling at Appendix D & ¶20. (Emphasis added). In fact, the claim is so embarrassingly misplaced in the case of paging carriers that it betrays a total lack of analysis or consideration of that class of carrier.

tice of terminating such traffic without having an interconnection agreement to govern compensation arrangements. New Section 20.11(f) thus sweeps entirely too broadly and, as applied to the paging industry, imposes a "solution" for which there is no rational basis whatsoever.

It is the Commission's obligation to implement clearly expressed Congressional intent; the Commission is not at liberty to substitute its own judgment on issues resolved by Congress in the Act.[4] Section 252(b)(1) of the Act explicitly confines the right to request interconnection solely to non-ILECs; and therefore the Commission lawfully may not decree otherwise.

Nor can the Commission properly invoke Sections 201 or 332 of the Act to validate new Section 20.11(f) of the rules. Neither section authorizes the Commission to delegate its statutory obligations under those provisions to state commissions, whether through compulsory arbitration by the states or otherwise; and the recent *USTA* decision by the Court of Appeals unambiguously established that "federal agency officials . . . may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so."[5]

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[4] *E.g., Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 842-843, 104 S. Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984) (when "Congress has directly spoken to the precise question at issue" the agency "must give effect to the unambiguously expressed intent of Congress").

[5] *USTA v. FCC,* 359 F.3d 554, 566 (DC Cir. 2004) (subsequent history omitted).

Conclusion

For the reasons stated above, the Commission should reconsider and rescind its promulgation of new Section 20.11(f) of the rules.

Respectfully submitted,

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